No. 527 12

In the Supreme Court of the United States

OCTOBER TERM, 1959

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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INDEX

CITATIONS

535154—60——1

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OPINIONS BELOW

The original opinion of the Court of Appeals, Judge Bazelon dissenting, is reported at 223 F. 2d 531 (Pet. App. A, pp. 1–89).

The second opinion of the Court of Appeals, Judge Bazelon dissenting in part and concurring in part, is reported at 254 F. 2d 314 (Pet. App. A, pp. 91–121). An unreported memorandum having reference to this opinion appears in Appendix A to the petition, pp. 122–123 (R. 2821–2822),[1] and an order clarifying the latter memorandum appears at R. 2831–2832.

[1] Like petitioner, we shall use "R." to refer to the printed record (pages 1–2169) filed with the Court at the October Term, 1955 (No. 48). Pages 2171–2871 refer to the proceedings before the Subversive Activities Control Board and the court below subsequent to this Court's remand, as contained in the certified record.

The third opinion of the Court of Appeals, Judge Bazelon dissenting in part and concurring in part (Pet. App. A, pp. 124–132), has not yet been reported.

The Modified Report of the Subversive Activities Control Board appears at R. 2403–2615 (Mod. Rep. 1–205), and the Modified Report of the Board on Second Remand at R. 2375–2402 (2d Mod. Rep. 1–22).

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1959 (Pet. App. B, p. 133), and a petition for rehearing (R. 2846–2848) was denied on August 27, 1959 (R. 2849). The petition for a writ of certiorari was filed on November 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 14(a) of the Subversive Activities Control Act of 1950 (see Pet. App. C, pp. 170–171).

QUESTIONS PRESENTED

1. Whether the Subversive Activities Control Act of 1950, as amended, is unconstitutional on its face or as applied in this case (Pet. Ques. 1).

2. Whether the order of the Subversive Activities Control Board rests upon a proper construction and application of the Act (Pet. Ques. 2).

3. Whether the order of the Board is supported by the preponderance of the evidence (Pet. Ques. 3).

4. Whether it was error to refuse to strike all of Budenz' testimony because it was not possible for the witness, due to illness, to be subjected to cross-examination with the use of his F.B.I. statements on the Starobin and Childs-Weiner matters (Pet. Ques. 4).

5. Whether in the particular circumstances the petitioner was entitled to the production of statements by the Attorney General's witnesses relating to their direct testimony (Pet. Ques. 5).

6. Whether the court below, having sustained the ultimate finding of the Board as supported by other findings and by the preponderance of the evidence, erred in refusing to remand because a subsidiary finding of the Board lacked evidentiary support (Pet. Ques. 6).

STATUTES INVOLVED

The pertinent provisions of the Subversive Activities Control Act of 1950 (Title I of the Internal Security Act of [September 23,] 1950, c. 1024, 64 Stat. 987, 50 U.S.C. 781 *ff.*), as amended, the Immigration and Nationality Act [of June 27, 1952], c. 477, 66 Stat. 163, the Communist Control Act of [August 24,] 1954, c. 886, 68 Stat. 775, and the Social Security Amendments of [Act of August 1,] 1956, c. 836, 70 Stat. 824, 42 U.S.C. 410, are set forth in Appendix C to the petition for certiorari, pp. 134–181.

STATEMENT

On November 22, 1950, the Attorney General filed with the Subversive Activities Control Board (the "Board") a petition under Section 13(a) of the Subversive Activities Control Act of 1950 (the "Act"), for an order directing the present petitioner, the Communist Party of the United States, to register with him as a "Communist-action organization" as required by Section 7 (a), (c) and (d) of the Act (R. 143–159). Hearings and the taking of evidence com-

menced April 23, 1951, before a hearing panel of three Board members and continued to July 1, 1952 (R. 1–2).

On October 20, 1952, the hearing panel issued a recommended decision, finding the petitioner to be a Communist-action organization and recommending that it be ordered to register as such. On April 20, 1953, the Board issued its Report (R. 1–137) and Order (R. 138) directing the petitioner to register. The Report concluded that "[u]pon the overwhelming weight of the evidence in this proceeding, we find that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement referred to in Section 2 of the Act; and that [petitioner] operates primarily to advance the objectives of such world Communist movement" (R. 132).

On June 17, 1953, the Party filed under Section 14(a) of the Act a petition in the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Order (R. 139–142). On December 23, 1953, that court, with Judge Bazelon dissenting, affirmed the Board's Order. *Communist Party of the United States* v. *Subversive Activities Control Board,* 223 F. 2d 531 (Pet. App. A, pp. 1–89). At the same time, the court denied (without a separate opinion) a motion of the petitioner for leave to adduce additional evidence going to the credibility of three of the Attorney General's witnesses (Crouch, Johnson, and Matusow). The court struck two of the Board's subsidiary findings of fact (223 F. 2d at 574, 575; Pet. App. A, pp. 72, 74), and concluded, after reviewing the evidence (223 F. 2d at 565–576;

Pet. App. A, pp. 55–75), that the ultimate finding was supported by a preponderance of the evidence.[2]

This Court granted a petition for certiorari on May 31, 1955. 349 U.S. 943. After argument, the Court, pointing out that the Government had not denied the allegations as to the credibility of the three witnesses (351 U.S. 115, 121), found that the denial by the Court of Appeals of the motion for leave to adduce additional evidence was erroneous, and without deciding other issues, reversed and remanded the case to the Board for hearing or such other action as the Board might take in order to make certain that its findings were based on "untainted" evidence. *Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115, 125.

Following the remand, the Board expunged the testimony of the three witnesses, Crouch, Johnson, and Matusow (Memorandum Opinion and Order of August 10, 1956, R. 2171–2191). On November 5, 1956, the Court of Appeals, on petitioner's motion, entered an order empowering the Board to entertain a motion relating to alleged perjury by another witness, Markward (R. 2757).

Petitioner made a motion to that effect before the Board, which granted it in part (R. 2206–2212). In December 1956, before the Board, counsel for petitioner exhaustively cross-examined Markward (R. 2231–2253, 2271–2275).

[2] The opinion also referred to the denial of the motion for leave to adduce additional evidence, stating that the credibility of witnesses is primarily for the trier of fact, and that there had been full opportunity for cross-examination of the witnesses and their testimony was supported by masses of other evidence (223 F. 2d at 565; Pet. App. A, p. 54).

On December 18, 1956, the Board issued its "Modified Report" (Mod. Rep. 1–205; R. 2403–2615) in which, after reconsidering the record (excluding the testimony expunged), it concluded "that the evidence establishes beyond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union * * * and operates primarily to advance the objectives of such world movement" (Mod. Rep. 204; R. 2609). The Board recommended that the Court of Appeals affirm the Board's order requiring registration (Mod. Rep. 205; R. 2610).

On review, the Court of Appeals, on January 9, 1958, remanded the case for production to the petitioner of certain reports made to the F.B.I. by Markward, but affirmed the action of the Board on all other points. *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d 314; Pet. App. A, pp. 91–121. Subsequently, on April 11, 1958, the Court enlarged the scope of the remand order to include the production of "statements"—as defined by 18 U.S.C. 3500—made by the witness Budenz to the F.B.I. (R. 2820).[3]

[3] After the Court of Appeals' opinion of January 9, 1958, government counsel discovered, in the files of the F.B.I., mechanical recordings of an interview of Budenz with the F.B.I., which had been recorded without Budenz' knowledge (R. 2804–2806), and the existence of which had not previously been known to counsel or to the Board. The Board reported this discovery to the court, by an affidavit of counsel, whereupon the court by an order of April 11, 1958 (R. 2819), construed by an order of June 16, 1958 (R. 2831), remanded to the Board for production of all "statements" of Budenz relating to the "Starobin letter" and the "Childs-Weiner conversation." (Those items are described, *infra*, pp. 18–19).

The hearing before the Board was reopened before a Member of the Board sitting as Examiner. He granted in part and denied in part petitioner's motions to strike the testimony of Budenz and for the production of documents, reevaluated the credibility of the witnesses Markward and Budenz, re-examined the evidence, and recommended certain modifications in the Modified Report and that the Board affirm its determination that petitioner is a Communist-action organization as defined in the Act (2d Mod. Rep. 9–12; R. 2386–2389).

Exceptions to this recommendation were filed and argued, and on February 9, 1959, the Board issued its Modified Report on Second Remand, reaffirming the findings and conclusions of its Modified Report of December 18, 1956, with certain changes and modifications (2d Mod. Rep. 1–22; R. 2375–2399).

On July 30, 1959, the Court of Appeals affirmed this order of the Board, Judge Bazelon concurring in part and dissenting in part (Pet. App. A, pp. 124–132).

DISCUSSION AND ARGUMENT

I

THE CONSTITUTIONALITY OF THE ACT AND ITS CONSTRUCTION AND APPLICATION BY THE BOARD

The first two questions raised by the petitioner are substantially the same as those presented by it in the former petition at the 1954 Term.[4] For that reason

[4] Compare the present "Questions Presented" (Pet. 4–5; and see Pet. 18–59) with the questions urged in the former petition (No. 718, Oct. Term, 1954, pp. 2–3, 42–76).

we do not oppose the granting of the petition for a writ of certiorari on the issues comprised within those two questions.

II

A REVIEW OF THE EVIDENCE BY THIS COURT IS NOT REQUIRED

However, we urge that certiorari should not be granted on petitioner's Question 3, *i.e.*, whether the order of the Board is supported by the preponderance of the evidence in the present record (Pet. 4).

A. Section 14 of the Act provides for review of the order of the Board by the Court of Appeals, and that "[t]he findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive." The court below recognized that the "preponderance of the evidence" standard of the Act allowed greater latitude for judcial review than do other statutes, and also imposed a "laborious task" upon the reviewing court (223 F. 2d at 562; Pet. App. A, p. 49). Accordingly, on each of the three occasions when the Board's order was before it, the court made a painstaking and exhaustive review of the evidence. See 223 F. 2d at 565–576, Pet. App. A, pp. 55–76; 254 F. 2d at 331–333, Pet. App. A, pp. 117–121; R. 2837, Pet. App. A, p. 126.

Since the Court of Appeals has the "normal and primary" responsibility for reviewing the findings of the Board, and has carefully done so on three occasions, with the final result that the court found that the Board's findings are "amply supported" (Pet. App. A, p. 125), it would seem that further review by

this Court is not necessary. *National Labor Relations Board* v. *American Insurance Co.*, 343 U.S. 395, 409–410; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503; *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 397–404; *Peurifoy* v. *Commissioner*, 358 U.S. 59, 61.

B. In this Court, the petitioner adopts the same approach to the facts which it followed in the court below: disregarding all the rest of the evidence, it concentrates on certain segments and expands them to produce the impression that there is nothing else significant in the record. But the record on which the Board made its findings consists of more than 14,000 pages of testimony from 19 witnesses for the Attorney General, and 3 for the petitioner, and more than 500 exhibits.[5] All of that record must be taken into account.

A brief review of important parts of the evidence will demonstrate the error in petitioner's selective approach.

1. In its Modified Report the Board said:

> Our reconsideration of the record as expunged leads to the conclusion that the evidence establishes beyond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement referred to in section 2 of the Act, and operates primarily to advance the objectives of such world movement * * *. [Mod. Rep. 204; R. 2609.]

[5] The findings of the Board are set out in a Modified Report and a supplement of over 200 pages (R. 2375–2615), with numerous quotations from exhibits and testimony.

This is the finding of ultimate fact which brings the petitioner within the definition of a "Communist-action organization" in Section 3(3) of the Act.

On the record, the control of petitioner by the Soviet Union is shown by ample evidence. In 1934, one of petitioner's leaders wrote in an article:

> * * * The leading role of the Communist Party of the Soviet Union in the Comintern needs neither explanation nor apology. A party that has opened up the epoch of the world revolution * * * is cheerfully recognized and followed as the leading party of the world Communist movement. [Quoted at Mod. Rep. 46; R. 2451.]

Again, in 1950, the statement appeared in an Party publication (*Political Affairs*) that:

> * * * The Soviet Union is the embodiment and leader of the forces of proletarian internationalism. * * * [T]he Communist Party of the Soviet Union * * * is the leading Communist Party of the world. * * * It is leading the fight for Socialism. * * * Communists [recognize] the leading role of the Communist Party of the Soviet Union. [Quoted at Mod. Rep. 120; R. 2525.]

This control via the leadership of the Soviet Union is enforced by a requirement of rigid discipline within the Party. As the Court of Appeals said in its first opinion (223 F. 2d at 574; Pet. App. A, pp. 72–73):

> The Board * * * found that an iron discipline exists throughout the world Communist movement, which requires unquestioned devotion to the program laid down by the Soviet Union, and that the Party has recognized and accepted that requirement. * * *

> The requirement of iron discipline within the Communist movement is one of the basic principles of the movement. It is the "democratic centralism" so vigorously insisted upon by Communist leaders * * *. The evidence * * * included the Classics, many publications, categorical assertions by witnesses on the stand, and incidents in which those who departed from the Communist program were expelled from the Party, including, among others, the experiences of Gitlow in 1929, Kornfeder in 1934, * * * Lautner in 1950, Tompkins in 1951, and the demotion of Browder in 1945. Identification of the Soviet Union as the leader of the world Communist movement is amply shown. * * * We think the finding on this point is supported by a clear preponderance of the proof.

The finding of "control" implies a prediction that the Party, the entity controlled, will act in the future in accordance with the leadership of the Soviet Union. Taking petitioner's own words at their face value, petitioner has admitted and even vaunted Soviet control in that sense.

Other evidence showed that at least from 1920 to 1940 petitioner was a part of the Soviet-controlled and dominated organization of Communist parties throughout the world known as the Communist International or "Comintern" (Mod. Rep. 41–69, 91–96; R. 2446–2474, 2496–2501). See 223 F. 2d at 569; Pet. App. A, p. 63. In 1940, petitioner announced its disaffiliation from the Comintern in order to avoid having to register as a foreign agent under the Voorhis Act (Mod. Rep. 93, R. 2498). An abundance of evidence, however, established that this "disaffiliation"

was merely formal, and that during the period since 1940 petitioner continued to adhere to and to follow the rules and tactics of the world Communist movement and has never differed from the program and policy of the Communist Party of the Soviet Union.

To a degree unusual with "political" parties, petitioner—before and after the 1940 "disaffiliation"—has regulated and patterned itself on the "Marxist-Leninist Classics," such as the writings of Stalin, the *History of the Communist Party of the Soviet Union,*[6] *Foundations of Leninism,* and Dimitroff's *Report to the Seventh Congress* (Mod. Rep. 37–38; R. 2442–2443). These books set forth the objectives, the strategies and tactics, and the rules for the world Communist movement (Mod. Rep. 7–40; R. 2412–2445). In 1945, Party leader Dennis urged a return to the study of the classics (Mod. Rep. 37; R. 2442).[7] The objectives, the strategies and the tactics of the movement being thus set out in the classics, and petitioner's leaders having been in large part trained and indoctrinated in the Soviet Union (particularly

[6] The *History* was written with the immediate participation of Stalin and authorized by the Central Committee of the Communist Party of the Soviet Union. In about 1939 or 1940, petitioner joined with the Communist parties of France, Great Britain, Germany, and Italy in adopting a resolution concerning its use "in the successful mastering of Bolshevism by the Communists of the capitalist countries" and as "one of the greatest events in the life of the Communist world movement * * *." (Quoted in Mod. Rep. 34; R. 2443.)

[7] For specific programs carried out by petitioner because the "Classics" required such action, see Mod. Rep. 98–99, R. 2503–2504 (revision of policy and internal reorganization in 1945); Mod. Rep. 123–128, R. 2528–2533 (opposition to "imperialism"); Mod. Rep. 131–139, R. 2536–2544 (major programs).

at the Lenin School), the petitioner has been and is (as the Court of Appeals found) an obedient follower of the tenets of Marxism-Leninism. One of those basic tenets is the leadership of the Soviet Union. See 223 F. 2d at 571; Pet. App. A, p. 66.[8]

2. Foreign domination or control is an element of the definition in Section 3(3) of the Act of a "Communist-action organization." The same terms appear in Section 13(e), which sets out eight tests or criteria for the Board to take into consideration in determining whether an organization comes within Section 3(3). Those criteria are types of evidence, but not necessarily the only ones, which could form the basis for an ultimate finding of domination or control. The Board made specific findings of the extent to which the petitioner met all of these criteria and the court below held that those specific or subsidiary findings were supported by a preponderance of the evidence in all but one instance.[9]

Section 13(e)(2) provides that the Board shall consider the extent to which the views or policies of the organization "do not deviate" from those of the foreign government or organization. The petitioner does not attempt to deny the identity of its program and policy with those of the Soviet Union,[10] and a few

[8] Petitioner keeps itself current on Soviet policies by maintaining a "correspondent" in Moscow for the *Daily Worker*, and by following the authoritative statements of *Pravda* and other Soviet organs (Mod. Rep. 117; R. 2522).

[9] The lone exception we discuss *infra*, pp. 26–27.

[10] Petitioner does contend (Pet. 55–56) that there must be a showing in each instance that the Soviet view antedated the petitioner's, and that a similarity of "non-seditious" views is immaterial. But a consistent identity of views and policies,

specific instances will show the record support for the Board's "non-deviation" finding. A notorious one is the petitioner's abrupt about-face in its attitude towards Nazi Germany at the time of the Hitler-Stalin pact in 1939 (Mod. Rep. 152; R. 2557). Another is the reversal in 1948 of petitioner's attitude towards the Tito Government in Yugoslavia, following the Soviet Union's bitter denunciation of that government (Mod. Rep. 153; R. 2558). In addition, the Board took into account petitioner's complete acceptance of and adherence to the rules and principles of Marxism-Leninism and its "non-deviation" in regard to some 45 major international questions, over the past 30 years (Mod. Rep. 156–157; R. 2561–2562); and the court below mentioned many of these items in its opinion holding the finding supported by a preponderance of the evidence (223 F. 2d at 572; Pet. App. A, p. 68).

In attacking the finding that the "reporting" element of Section 13(e)(5) applied, petitioner urges that there was a "total absence of evidence" to support the finding, and that " 'Reporting' has a rational tendency to prove foreign control only if the report is made to facilitate supervision of the accused organization" (Pet. 56). But the Board found, and set out the evidence, that supervision was found to have been exercised on occasion by Soviet agents in the United States, and that reports were made by so-called published "greetings" to the Soviet Union and by letters and visits to Russia by members of petitioner (Mod.

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seditious or not, is a legitimate basis for an inference of control, and which party to the relationship made its view public first is immaterial.

Rep. 103–105, 167–178; R. 2508–2510, 2572–2583). The Court of Appeals held that "[t]here is a preponderance of evidence * * * to support a conclusion that upon occasion leaders of the Party report to representatives of the Soviet Union" (223 F. 2d at 574; Pet. App. A, p. 72).

Similarly, the Board found, with ample citation of evidence (Mod. Rep. 194–202; R. 2599–2607), that petitioner's "leaders and a substantial portion of its membership consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union" (Mod. Rep. 202; R. 2607). And the Court of Appeals approved, saying, "Certainly prior to 1941 the leaders of the Party USA declared fealty to the Soviet rulers, and the same men are now leaders of the Party" (223 F. 2d at 575; Pet. App. A, p. 74).

Petitioner also attacks the evidence of the existence of a "world Communist movement," basing the challenge on its own interpretation of the term (Pet. 58–59). The court below held, however, that the Board's finding on this point was "supported by a clear preponderance of the evidence" (223 F. 2d at 568; 254 F. 2d at 320; Pet. App. A, pp. 61, 95). The Board recited the evidence at length in its Modified Report, pages 41 to 90 (R. 2446–2495).

Petitioner's main argument is that the evidence did not prove that it operates primarily to advance the objectives of the world Communist movement (Pet. 60–63). Eschewing any attempt to assay the record as a whole, it says that the evidence does not support a finding that it "advocates violent overthrow" of the

government (Pet. 60) or that it has the objective of establishing in this country a "totalitarian dictatorship" subservient to the Soviet Union (Pet. 61–62). The Board found, on the contrary, that petitioner "has as a fundamental purpose, which it constantly seeks to further, the overthrow of the Government of the United States by any means, including force and violence if necessary" (Mod. Rep. 202; R. 2607), and also that "there is inside our borders a disciplined organization [petitioner] which under Soviet Union control seeks, by unconstitutional means, to install a Soviet style [Communist] dictatorship in the United States, just as other Communist Parties in other countries have done" (Mod. Rep. 204, also 89; R. 2609, 2494). In support, the Board cited an abundance of evidence.[11]

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[11] See also Mod. Rep. 197–201; R. 2602–2060; also Mod. Rep. 196–197; R. 2601–2602.

The Board recognized that petitioner would, of course, be entirely satisfied to obtain control by a political coup such as took place in Czechoslovakia, with the Soviet Union standing in the wings (Mod. Rep. 90; R. 2495); that if for some reason a government should voluntarily accede to a dictatorship of the proletariat, or should not choose to defend itself from lawless attack, force would not be necessary (Mod. Rep. 40, fn. 1; R. 2445). This does not mean, however, that petitioner does not plan to incite to force and violence if deemed necessary, and the evidence shows that it does so plan. The Board also noted, in effect, that some dictatorships of the proletariat are controlled by a national Communist Party in alliance with the Soviet Union. This does not negative subservience, as petitioner argues it does. The theory of the world Communist movement, as amply revealed by the record, is that the national Communist Party will lead and direct the dictatorship in the particular country but the national Party itself will do so under the direction and control of the Soviet Union.

3. It is feasible in this memorandum to advert only to a small amount of the evidence underlying the factual findings made by the Board, and to give but a few illustrative citations to the Modified Report and the opinions of the Court of Appeals. A large number of the Board's findings were based upon documentary evidence. The bulk of the exhibits consisted of official Communist Party documents, including reports made by Party leaders to meetings of official Party boards, committees, and other groups; study and teaching materials used in Party schools and other meetings; resolutions and programs adopted by the Party and its leadership; and various authoritative Party writings.

No single piece of evidence can serve to prove the ultimate issues in determining whether an organization is a "Communist-action organization," as defined in the Act. Such a determination must rest upon a consideration of the record as a whole. As the Board commented with respect to petitioner: "Being the type of organization it is—prolific in its writings and, by its own admission, frequently obscure in some of its activities—it is necessary to piece together a myriad of activities and official statements to ascertain its nature and status" (Mod. Rep. 5; R. 2410). This was done by the Board, and the court below, after repeated careful scrutiny, has correctly sustained the findings of the Board as supported by the preponderance of the evidence. For these reasons, we respectfully suggest that this Court should decline to grant review on petitioner's Question 3.

III

THERE WAS NO ERROR IN THE REFUSAL TO STRIKE ALL OF THE TESTIMONY OF BUDENZ

Budenz, a former editor of the *Daily Worker*, testified for the Attorney General at the original Board hearing. His direct examination lasted almost two days and he was cross-examined for about five days (R. 2298). His testimony included eight pages of direct examination and thirty pages of cross-examination relating to the Starobin letter; on the Childs-Weiner conversation there were two pages of direct examination and ten pages of cross (R. 2299). The cross-examination on these subjects was based in part on prior statements made by him.[12]

At the original hearing, the petitioner moved for the production of any F.B.I. reports of interviews with Budenz concerning the Starobin letter and the Childs-Weiner conversation,[13] but the Board denied the motions (*ibid.*). Following the first remand by this Court, the Board again denied similar motions (R. 2217–2218, 2225), and the Court of Appeals affirmed on the ground that there did not appear to be any such "statement" as defined in 18 U.S.C. 3500 (254 F. 2d at 324–326; Pet. App. A, pp. 104–107).

In response to a petition for rehearing filed by petitioner, the Board filed with the court an affidavit of counsel for the Attorney General stating that counsel

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[12] In a book he wrote and statements he had made before Congressional committees (R. 2299).

[13] Petitioner did not request any other "statement" of Budenz (see *infra*, pp. 24–26).

had just discovered in the F.B.I. files recordings of an interview with Budenz which had been recorded without notice to Budenz and which referred to the Starobin and Childs-Weiner matters (R. 2811–2813; see footnote 3, *supra*, p. 6). The court thereupon enlarged the order of remand to include "statements", as defined by 18 U.S.C. 3500, made by Budenz to the F.B.I. in regard to the Starobin and Weiner matters (R. 2820).

The Examiner (*supra*, p. 7) considered the recordings *in camera* and excerpts dealing with the two matters were furnished to petitioner (2d Mod. Rep. 10–12; R. 2387–2389). It developed, however, that the ill health of Budenz had made it impossible, as the parties agreed, to recall him for further cross-examination (*ibid.*).

The petitioner then moved to strike all the testimony of Budenz (2d Mod. Rep. 11; R. 2388). The Board, however, as recommended by the Examiner, concluded that "the fair thing [was] to strike the testimony on the Starobin letter and the Weiner conversation", but to permit the remainder of the witness' testimony to stand (2d Mod. Rep. 14; R. 2391). The Court of Appeals affirmed on the point (Pet. App. A, pp. 128–129).

This disposition of a situation which is admittedly unusual was entirely reasonable. Budenz had previously been cross-examined at length for nearly five days—and in the original transcript the examination, direct and cross, devoted to the Starobin and Childs-Weiner matters takes up only 50 pages (R. 2299) out

of a total in excess of 700 pages on all matters.[14] The Board pointed out that none of Budenz' other testimony was dependent upon, or inseparable from, his testimony on the Starobin and Childs-Weiner matters, and that much of his other testimony was corroborated by other credited evidence, either documentary or oral; moreover, in his other testimony Budenz was specific as to names, dates, and places, but petitioner made no attempt to rebut his testimony by witnesses who were available (2d Mod. Rep. 13–14; R. 2390–2391).

The rule is that under such special circumstances the remaining direct testimony of the witness may in the discretion of the trier of the facts be permitted to stand, since the deprivation of cross-examination as to the discrete matters does not constitute a material loss. See 5 Wigmore, *Evidence* (3d ed., 1940), § 1390. On this record it would seem that the cross-examination of Budenz, on behalf of petitioner, as to matters not stricken was extensive and substantially accomplished its purpose. Cf. *United States* v. *Toner,* 173 F. 2d 140, 144 (C.A. 3); *Jaiser* v. *Milligan,* 120 F. Supp. 599, 604 (D. Neb.).

Petitioner's principal contention appears to be that the loss of opportunity for further cross-examination prevented it from establishing that *all* of Budenz' testimony should have been stricken as "tainted," within *Mesarosh* v. *United States,* 352 U.S. 1. But there is a wide gap between mistake or failure of memory and perjury; and there is no sufficient basis in this case for believing that further cross-examination of Budenz

[14] Direct: Tr. 13787 *ff.;* Cross: Tr. 13957 *ff.;* Redirect: Tr. 14530; Recross: Tr. 14553 *ff.*

as to the Starobin and Childs-Weiner matters would reveal perjury as to the non-stricken testimony. On the whole record and bearing in mind the opportunities petitioner had to attack Budenz' testimony by the original cross-examination as well as by other evidence, the Board made a fair disposition of the question, and the court below so held (Pet. App. A, pp. 128–129).[15]

IV

THE REFUSAL TO ORDER THE PRODUCTION OF PRIOR STATEMENTS OF THE ATTORNEY GENERAL'S WITNESSES WAS PROPER[16]

A. THE GITLOW MEMORANDA

The Attorney General's witness Gitlow, whose background is discussed at length by the court below (254 F. 2d at 320–324; Pet. App. A, pp. 96–104; *id.*, 126–127), turned over in 1940 to the F.B.I a mass of documents and minutes pertaining to the petitioner's early activities (R. 2253). About the same time he dictated for the F.B.I numerous "explanatory memoranda" interpreting those documents (R. 2255–2257), a task which took him three weeks to complete (Tr. 2256). At the proceedings before the Board, much of Gitlow's direct testimony consisted of his identification and explanation of some of the documents which he had delivered to the F.B.I. (254 F. 2d at 320; Pet. App. A, p. 96). In the course of Gitlow's direct tes-

[15] Petitioner's statement that the Attorney General and the Board were "responsible" for depriving it of its right to cross-examine with the aid of F.B.I. statements (Pet. 66) is an attempt to base "responsibility" on the taking of a legal position which had at that time respectable, and perhaps majority, support in the reported cases.

[16] Question Presented "4" (Pet. 5; and see *id.*, 68–73).

timony, counsel for the Attorney General used two memoranda to refresh the witness' recollection (R. 2257); these were turned over to the petitioner (*ibid.*). Thereafter, petitioner's counsel requested the hearing panel to order production of all documents—and the corresponding explanatory memoranda—in the possession of the F.B.I. and, additionally, any other memoranda pertaining to any statements which Gitlow may have given to the F.B.I. The request was denied (R. 2257).

It is petitioner's present claim (Pet. 68–70) that the Court of Appeals' denial of its subsequent motion for leave to adduce as additional evidence the Gitlow "memorandum" [*sic*] "violated accepted standards of fair play" (Pet. 70). We submit that the court below was amply justified in its ruling.

1. There is no basis for the contention (Pet. 69) that the Court of Appeals misapplied the rule of *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197. The Board's original denial of production of the Gitlow memoranda was in issue on the first appeal and the court, after an exhaustive review of the record, affirmed the Board's order of registration. During the Board proceedings under the first remand, motions for the production of the Gitlow documents were made again. The Board reviewed its original denial in the light of this Court's opinion and, there being no supervening circumstances requiring otherwise, affirmed it (R. 2187–2189, 2225). Petitioner raised the issue again in its appeal following the first remand, and the court below in its January 9, 1958, opinion ruled that petitioner was foreclosed

in the matter, having failed to follow the prescribed and exclusive remedy of Section 14(a) by filing a motion to adduce additional evidence (254 F. 2d at 323–324; Pet. App. A, pp. 102–104). When petitioner then filed such a motion, the court below merely adhered to its earlier ruling that petitioner was precluded by not having followed the exclusive remedy of the statute (order of April 11, 1958; Pet. App. A, pp. 122–123). In its latest opinion, the Court of Appeals reaffirmed its earlier holding (Pet. App. A, pp. 126–127).

Contrary to petitioner's suggestion that the Court of Appeals has unreasonably "extended" the *Consolidated Edison* doctrine (Pet. 70), we submit that refusal to order production of prior statements which might have possible impeachment value—assuming that the demand was properly made—is far less grievous than refusal to receive vital testimony, as in the *Consolidated Edison* case. The opinion of the Court there states (305 U.S. at 226):

> We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. * * * But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence * * * [under a statutory provision almost identical with that contained in Section 14(a)].

Having failed to avail itself of the statutory remedy, the petitioner in the *Consolidated Edison* case was precluded from presenting the point on appeal. We believe the principle applies with equal, if not *a fortiori*, force where, as here, a collateral issue is at

stake and the complaining party fails to pursue the proper remedy."[17]

2. Moreover, even under *Jencks* v. *United States*, 353 U.S. 657, petitioner's notice was bad in form as far too broad.[18] What it demanded was *all* the documents Gitlow turned over to the F.B.I., *all* the explanatory memoranda—termed "the memorandum" by petitioner (Pet. 68)—and *all* other memoranda written by the witness or transcribed by the F.B.I. and in its possession.

B. THE BUDENZ STATEMENTS TO THE F.B.I.

The petitioner contends (Pet. 70–72) that the Court of Appeals should have granted its January 24, 1958, motion (R. 2797–2801) for the production of so much of the mechanical recordings and of F.B.I. memoranda of subsequent interviews with Budenz as related to any part of that witness' direct testimony before the Board.

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[17] Petitioner is factually incorrect in referring to but one memorandum. It was apprised at the Board proceedings of the existence of a multitude of such memoranda (R. 2255, 2257). It is clear that before the Board petitioner chose to refer to all these memoranda in the singular (R. 2256; Tr. 2768, 2770), and that its motion was designed to embrace all of them.

[18] Petitioner's counsel demanded:

> First, all of the documents which this witness says he turned over to the Federal Bureau of Investigation.
>
> Second, the memorandum, so-called explanatory memorandum, which this witness testified that he prepared and turned over to the Federal Bureau of Investigation.
>
> Third, any other memorandum, either written by this witness or transcribed by the F.B.I. from an oral statement made by him, in the possession of the F.B.I. [R. 2256.]

The court below ruled (R. 2831) that—

> The Party is entitled to the production of statements made to the F.B.I. by Budenz, *in so far as it demanded such statements at the original hearing before the Board.* It could not [now] make a valid blanket demand for any and all statements made to the F.B.I. by Budenz concerning any (unspecified) subject about which he testified. * * * The F.B.I. statements demanded by the Party at the hearing concerned the Starobin letter and the Weiner conversation. * * * [Emphasis added.]

Since (as already indicated) it subsequently developed that "statements" did exist as to the Starobin and Weiner matters, the court below ordered them produced.

titioner asserts that it did not request production before the Board of the other Budenz statements because in ruling on its Gitlow motion the Board had "established a principle" that prior statements to the F.B.I. were producible only upon a showing of inconsistency (Pet. 71). The record does not support that statement. According to the record, the only reason assigned by the Board for its ruling was that "the record fails to disclose any factual situation justifying the granting of the [motion]" (Tr. 2886). Petitioner was not foreclosed, and should not have considered itself foreclosed, from demanding other statements if it desired them. It did not do so and cannot now complain.

C. PRIOR STATEMENTS OF OTHER WITNESSES

During the second remand proceedings before the Board, petitioner for the first time demanded *all*

"statements" of *all* the Attorney General's witnesses on *all* subject matters of their testimony (R. 2338). By a motion filed with the court below on April 14, 1959 (R. 2833), petitioner—also for the first time—requested all such "statements," seeking to justify the belated demands by the factually erroneous contention that, having been denied production of the Gitlow memoranda at the original hearing, petitioner did not make the demands in respect to subsequent witnesses because it considered such demands would have been "fruitless."

We submit that the Court of Appeals' decision holding the demand to be too late is entirely proper. The court said (Pet. App. A, p. 127):

> * * * If a litigant in an ordinary lawsuit fails to make a motion * * *, and the appellate court holds he was not entitled to certain relief because he had not asked for it by timely motion, he cannot thereafter proffer the motion and thus correct the defect and acquire a right to retrial. Failure of a tribunal to grant a motion not made is not reversible error * * *.

V

THE FINDINGS AS TO PETITIONER'S "SECRET PRACTICES"

Petitioner also suggests that the court below erred in failing to remand again to the Board when it held that the revised finding as to the purpose of petitioner's secret practices (Mod. Rep. 179–193; R. 2584–2598) was not supported by a preponderance of the

evidence (Pet. 73–74). The finding in question, however, went only to Section 13(e)(7), one of the eight standards or criteria found in Section 13(e) of the Act. The court below originally affirmed the order of the Board because it held that its ultimate finding had ample support in other basic findings, which in turn were supported by the preponderance of the evidence (223 F. 2d at 576; Pet. App. A, p. 76), and it did so again in its last review (Pet. App. A, pp. 126, 132). That being so, and even if we assume for the present purposes that the holding of the court as to the "purpose" finding was correct, another remand would have served no useful purpose. The questioned finding could be properly treated as of minor importance and separable (see *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S 17, 20), since on the Modified Report as a whole there is no room for conflicting inferences; it is clear that the Board's order would have been the same if the "purpose" finding had been omitted altogether. See *Sec'y of Agriculture* v. *United States*, 347 U.S. 645, 653; *Colorado Interstate Co.* v. *Federal Power Commission*, 324 U.S. 581, 595.

CONCLUSION

The first two of the Questions Presented in the petition (Pet. 4) raise questions of importance, and we do not oppose the grant of certiorari thereon. The remaining Questions (Nos. 3, 4, 5, 6; Pet 4–5), however, do not present problems that appear to require or warrant review by this Court, and therefore we

respectfully suggest that any grant of certiorari in this case should be limited to Questions 1 and 2.

Respectfully submitted.

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